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Ms. Karen E. Torrent
Trial Attorney
U.S. Department of Justice
Environmental Enforcement Section
Post Office Box 7611
Washington, DC 20044-7611

Re: Site G, Area 1, Sauget Superfund Site Cost Demand

Dear Ms. Torrent:

I am writing regarding U.S. EPA's demand for Superfund response costs expended at Sauget Area 1, Site G. Enclosed herein, please find Monsanto's Response to EPA's Site G Demand Letter, which establishes that there is insufficient evidence upon which to impose CERCLA liability upon Monsanto regarding Site G.

Despite Monsanto's position that it is not liable for any response costs associated with Site G, we are continuing to evaluate EPA's cost claim. We have received certain cost documentation from EPA, and our review of the material has raised the following issues:

(1) The response costs demanded are purportedly for costs expended at Site G, yet the backup documentation is replete with references to Area I, with only some references to Site G. The following are examples of documentation which does not support the conclusion that the expenditures are properly attributable to Site G.

Sam → ⊙ The timesheets provided as backup for the regional payroll costs refer to "Sauget Area One," "Sauget Area I General Enforcement," "Sauget Area I Remedial Community Relations," "Sauget Area One General Support and Management," "Sauget G/Dead Creek 1."

Sam → ⊙ The vouchers for Riedel Environmental Services reference "Sauget Area 1 Site" and "Sauget Landfill," as well as "Sauget Site G."

In order to recover the costs claimed, EPA must provide documentation that demonstrates that the costs were incurred in connection with Site G. The references to Sauget Area I do not offer such support.

Violet → (2) Entries of time have been made for 1996-98. The removal action was complete in 1995. We need further backup or explanation of why these costs were included.

Sam, Violet (3) The "representative sample" of documents contained in the "work performed" file indicate that EPA paid Riedel Environmental a 4.5% markup on costs incurred, which it terms "indirect costs" on its Cost Report. Please provide the basis for such a markup and why such a markup is recoverable as a response cost.

Violet → (4) EPA has not provided adequate documentation to show the appropriateness of including annual allocation costs as part of the claim for costs related to the Riedel Environmental Services and Ecology and Environment, Inc. contracts. We need information regarding to what these annual allocation costs pertain and how they relate to indirect costs charged by these companies.

Violet Sam → (5) The documentation provided to support the claim for reimbursement of IEPA costs is insufficient. No information has been provided which supports a determination that these charges were incurred related to Site G.

Sam → (6) The regional travel documentation includes a Travel Authorization document for Samuel Borries for "oversight of disposal activities at the Lanson Chemical Site" dated May 25, 1994. It thus appears that this travel charge and any related time have improperly been included in EPA's demand.

These preliminary issues must be addressed in order for Monsanto to properly respond to EPA's demand. Monsanto is not, by enumerating the above-mentioned issues, waiving any other issues it may have regarding the sufficiency of EPA's cost claim and its documentation.

Finally, I am in receipt of EPA's draft consent decree and am in the process of reviewing and preparing comments to the draft.

Very truly yours,

Thompson Coburn

By Joseph G. Nassif
Joseph G. Nassif

JGN/sls

cc: Thomas J. Martin ✓
Site G Demand Letter Recipients

MONSANTO'S RESPONSE TO EPA'S SITE G DEMAND LETTER

Factual Background

Site G is approximately 4.5 acres in size and is located west of Dead Creek, south of Queeny Avenue in Sauget, Illinois. Based on aerial photos analyzed by IEPA, there was no evidence of disposals of any kind at Site G until 1950, when a pit was identified. See Ron St. John Report, Figures 3a-3e (drawings of aerial photos).[1] Prior photos (1937 and 1940) do not identify this pit or any disposals. The Site G pit was dug to remove earth to build up the bed for New Queeny Avenue. Silverstein 4/24/95 Depo., p. 98. New Queeny Avenue was built somewhere between 1948 and 1955. (Based on records regarding land transfers of this property and aerial photos from the Ron St. John 1981 report.) EPA states that the site operated from 1952 to the late 1970s. EPA 1992 CERCLA Site Screening, p. 2-2.

Based on the St. John diagrams made from the aerial photos, the pit excavated by Sauget is entirely on Cerro property. EPA has defined the site as being somewhat larger than the Cerro property, although apparently not extending south beyond the Weise property.

Several environmental related investigations of the site have occurred over the years. The investigations have been documented in the 1981 Ron St. John Report, the 1988 "Expanded Site Investigation" by Ecology and Environment ("E&E" Report"), and the EPA's 1994 Removal Action Report.

In May of 1987 Monsanto voluntarily stepped forward to fence in Site G. This was done despite the fact that EPA had no evidence to show that Monsanto had a connection to the Site.

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[1] Ron St. John developed the first study of the Sauget area in *A Preliminary Hydrogeologic Investigation in the North Portion of Dead Creek and Vicinity*, April, 1981.

In 1995, a removal action was undertaken at the site by U.S. EPA. Up until the initiation of the removal action, the government acknowledged it did not have enough evidence to pursue any PRPs. Sam Borries stated in Polrep #1, March 28, 1995:

> At this time it is believed by the Agencies that issuing an order is unwarranted due to a lack of significant evidence to keep the PRPs involved.

At the time that Mr. Borries made that statement, EPA had an extensive amount of information on the contaminants at the site, but it had nothing further.

In Cerro v. Monsanto, the lawsuit Cerro filed against Monsanto regarding Dead Creek Segment A, a long time Cerro engineer, Sandy Silverstein, testified about his knowledge of Site G. Silverstein worked for Cerro from 1946-1971 and 1981-1989. He stated in deposition:

> I know that Leo Sauget did not operate a dumping operation there. [Referring to Site G]. Let me say, I am familiar with Leo's dumping operations, north of Queeny Avenue, and I met Leo a number of times, on various matters, but at no time was I – did I have reason to believe he was open dumping in that area . . . I think there was an area where it was mostly midnight dumping.

Silverstein Depo., 4/24/95, pp. 98-100. Silverstein also stated with regard to G that:

> I would imagine that anyone who had some waste material to get rid of downtown St. Louis, it was East St. Louis. They would be headed down Route 3 and the first place they get – place without civilization would be Queeny Avenue, and they just turn up and just a short distance away there is an open area where dumping was taking place in Leo Sauget's burning pits and there was evidence of dumping having been done before and that sure seemed to be – this would be a likely place for them to get rid of whatever they wanted to get rid of there.

Silverstein Depo., 6/14/94, pp. 143-144. Silverstein, a person who was knowledgeable regarding the operations of Site G, never observed or knew of any waste disposal/landfill operations on Site

G. The fact that G was not operated as a landfill by Sauget explains why EPA has found no evidence regarding disposals at the Site (i.e. Sauget invoices, waste in lists, etc.).

During the 1995 removal action, EPA recovered various items which it apparently now feels is strong enough evidence to tie Monsanto to the site. This evidence includes the following:

- 25 empty 50 lb. bags of "Monsanto Penta"
- Approximately 57 label stencils for various aroclors, dykanol-A, glycidal phenyl ether, etc.
- Receiving reports for Monsanto Chemical Co.
- Operations Manual for "Monsanto Chemical Company"
- Steel Barrel Co. receipts for the shipment of empty drums to Monsanto Chemical Co.
- Mulligan printing receipt to Monsanto
- American Chemical Society letter to Monsanto Chemical Co.
- Letter from Instrument Engineering Co. to Monsanto Chemical Co.
- Orvill Simpson Co., letter to Monsanto Chemical Co.
- Outbound freight receipts from Monsanto Chemical Co.

See 7/7/95 fax from Smith Environmental. Based on photographs given to Monsanto by EPA, an empty bag of Santomerse No. 1 was also found at the site.

Legal Argument

Under CERCLA, the government must prove by a preponderance of the evidence that Monsanto's waste was disposed of at Site G and that hazardous substances similar to those found in Monsanto's waste were present at the site at the time of release. See, e.g., Dana Corp. v.

American Standard, Inc., 866 F. Supp. 1481, 1493-94 (N.D. Ind. 1994) (citations omitted).[2] Here, even though circumstantial evidence may permissibly be aggregated to establish liability even where the individual pieces of evidence would be insufficient, see NutraSweet Co. v. X-L Engr. Corp., 933 F. Supp. 1409 (N.D. Ill. 1996), EPA can not establish Monsanto's liability for Site G.

Liability will not result if the government's evidence amounts to little more than speculation. Acme Printing Ink Co. v. Menard, Inc., 891 F. Supp. 1289, 1297-98 (E.D. Wis. 1995); Dana Corp., 866 F. Supp. at 1497-98. The government has the burden of proof as to each element of its claim, meaning that a defendant must simply establish that the evidence is insufficient to prove those elements. Dana Corp., 866 F. Supp. at 1494. The defendant does not have to prove that the government's claims are not true. Id.

In Acme Printing Ink Co. v. Menard, Inc., 870 F. Supp. 1465, 1485-86 (E.D. Wis. 1994), the court found that the evidence concerning a generator's waste was insufficient to establish liability. The plaintiff in Acme Printing argued that because the generator had no record that anyone other than Ed's Trucking (which hauled materials to the involved site) disposed of its drummed chemical waste during the requisite time period and that the pollutants contained in the generator's waste stream were consistent with the hazardous substances found at the site, then one could infer that the generator's waste "must have been" disposed of at the site. Id. at 1485. The generator presented affirmative evidence (depositions of Ed's Trucking personnel and Ed's invoices) that its waste was disposed of elsewhere. The court concluded that the plaintiff had not introduced sufficient evidence to rebut the defendant's affirmative evidence of disposal

[2] The burden of proof is the same whether the plaintiff is the government or a private party. Premium Plastics v. LaSalle Natl. Bank, 904 F. Supp. 809, 814-15 (N.D. Ill. 1995).

elsewhere. Id. On the other hand, where the plaintiff presented evidence that the hauler's practice was to dispose of fill at the site and where another defendant in the case acknowledged that its fill was hauled by Ed's, and acknowledged that its contaminated fill could have been hauled by Ed's, the court declined to enter summary judgment that the particular defendant was not liable. Id. at 1497.

Even more instructive of what type and amount of evidence, in the absence of direct evidence, is sufficient to find a defendant liable under CERCLA is found in Dana Corp., supra. Before applying the applicable standard to the specific facts and parties before it, the court held that:

> If the plaintiff demonstrates that the defendant produced a continuous and predictable waste stream that included hazardous constituents of the sort eventually found at the site, and that at least some significant part of that continuous and predictable waste stream was disposed of at the site, the factfinder reasonably may infer that the defendant's hazardous waste was disposed of at the site. If the plaintiff cannot demonstrate such a continuous and predictable waste stream, or is unable to show that a significant part of the defendant's waste stream reached the site, the plaintiff must present some further evidence to justify a reasonable factfinder in inferring that the defendant contributed to the hazardous waste at the site.

Dana Corp., 866 F. Supp. at 1489. The court then proceeded to examine the parties utilizing this standard. It found that 9 of the 10 defendants examined warranted the grant of summary judgment, despite the fact that in this summary judgment proceeding all reasonable inferences from the evidence were drawn in favor of the plaintiffs as the non-movants.

The Dana Corp. court was fairly rigorous in the proof it demanded from the plaintiffs. Speculation, as in "anything's possible," was flatly rejected. See, e.g., Dana Corp., 866 F. Supp. at 1506. Even testimony that one company sent 30 to 40 "empty" drums to the site was rejected as a basis for liability because the truck driver who delivered the drums did not know the

contents of the drums. Id. at 1511. Office floor sweepings contained in roll-offs sent to the site were rejected as a basis for liability because there was no evidence that they contained hazardous substances. Id. at 1512. In another defendant's situation, the court held that "the most the evidence shows is that [the defendant] may have generated some waste containing hazardous substances, and that some of the [defendant's] waste was taken to the Site, but it does not necessarily follow that the waste actually taken to the Site contained hazardous substances." Id. at 1518.

All the items found at Site G during the 1995 removal which EPA has attributed to Monsanto, other than the empty pentachlorophenol bags ("penta") and the Santomerse #1, are trash. There is no evidence that the trash contained a hazardous substance. This leaves only the penta bags and the bag of Santomerse #1 to attach liability to Monsanto.

Monsanto produced penta at the W.G. Krummrich ("WGK") plant from 1938-1978.[3] The material was packaged in pre-marked bags and shipped to purchasers. The penta bags would not have been disposed of by Monsanto, but rather used for packaging of product.[4] Filled product bags were shipped to customers. If Monsanto had off-spec product that it was disposing of, it would have discovered this prior to packaging. It would have had no reason to put off-spec product in product bags for disposal. Thus, the penta bags found on site could not have been Monsanto's, particularly since product residue was found in the bags. Clearly, the bags came

[3] The Queeny Plant undertook a pilot project for PCP production from 1936 to 1938. In October of 1938 the process was transferred to Krummrich.

[4] If the bags had been disposed of prior to filling with product, they would not have been a CERCLA hazardous substance because they would not have contained any penta.

from a Monsanto customer after the bags were emptied at the customer's property and were then sent off site as waste.

There is a potential source of the empty penta bags in Sauget, the old T.J. Moss Tie Company facility. T.J. Moss' operations involved the impregnating of railroad ties, telephone poles, etc., with wood treating compounds. This facility, which has undergone significant cleanup and which IEPA has been aware of for years, used over 500 pounds of dry penta per day in its processes. See Attachment. Monsanto documents indicate that its company that marketed the penta, Wood Treating, sold penta to Moss American. Thus, the empty bags of penta found at G, which could not have come from Monsanto could well have originated from T.J. Moss. Even if the bags did not come from T.J. Moss, Monsanto is not implicated because Monsanto would not have disposed of penta bags. Further, there were other users of Monsanto penta that could have discarded the emptied bags at Site G through midnight dumping.

We do not know if EPA found product in the Santomerse #1 bag. If it did, the bag must have been disposed of by a Monsanto customer. If it did not find any hazardous substance in the bag, then there is no evidence of disposal of a hazardous substance. See supra.

Monsanto has admitted that it used dialate in its processes in its response to EPA's 104(e) request. EPA found an empty bag of dialate at the site. Merely because a dialate bag was found is not evidence of the disposal of a hazardous substance. In fact, all available evidence in Monsanto documents and witness testimony in other cases indicates that Monsanto used filter aid such as dialate in some of its plant processes. An empty bag of filter aid only indicates that a bag that had contained clean filter aid was disposed of. It is not evidence of the disposal of contaminated filter aid. In addition, many other companies used dialute in their processes as a filtration material.

Because neither the penta nor the Santomerse came from Monsanto, the only new evidence EPA found at the site during the 1995 removal against Monsanto was non-hazardous office-type trash.[5] The presence of trash without any evidence of a hazardous substance associated with it is not sufficient evidence of disposal of hazardous substances. Acme, supra; Dana, supra.

Further, Monsanto has given to the government the various sites its hazardous wastes have been disposed of over the years. Its notifications to the government in 1979 identify use of a landfill on Falling Springs Road. The aerial photos from the Ron St. John Report indicate that there were disposals in the area along Falling Springs Road near Sauget Village Hall. Thus, the disposals referenced by the Monsanto reports were at the areas by the Village Hall. There is no evidence that Monsanto disposed of material at Site G.

In reports to the government and in other Monsanto documents given to the government in 104(e) responses, Monsanto never identified Site G, or a landfill along New Queeny Avenue as a disposal location. Thus, EPA continues to have insufficient evidence to prove that liability attaches to Monsanto at Site G.

The only other possible argument EPA has to hold Monsanto liable for Site G is based on an argument that the contaminants at Site G are a fingerprint to Monsanto materials. But this argument fails too. Based on the similarity of the contaminants at Site G and Site L, there is an explanation for the presence of materials at Site G. In 1963 Harold Waggoner & Co. bought parcels located between Falling Springs Road, Nickel and Queeny Ave., just south of Site H

[5] In the office trash were numerous label stencils. These stencils did not come from the production areas for the various products, but rather from an area designated for drum labeling. All drums for the plant were labeled in this area. The drums were then sent to the particular process area. As paper trash, these would have been disposed of in a manner similar to the office trash disposal.

(Site L). Waggoner operated a trucking operation which used this property for cleaning of the trucks. Based on testimony of Don Mayer in the Cerro lawsuit, Waggoner was trucking product for Monsanto before the purchase of Site L. All the contaminants alleged to be traceable to Monsanto were either products or constituents in products that could have been or were hauled by Waggoner. Where the Waggoner operations were prior to 1963 is not known at this time. It is possible that Waggoner used Site G for disposals.

However, Waggoner hauled only product for Monsanto, not waste. In such circumstances, Monsanto should not be liable for any contamination caused by the rinsing of any Waggoner trucks. Monsanto's intent behind transactions with Waggoner was for product transfer to customers, not disposal.

Such a fact scenario does not result in liability for Monsanto. Monsanto merely hired a trucking company to deliver product to its customers. It did not arrange for rinsing the materials on the ground during tank cleaning operations. Thus, it can not be found liable for such actions by Waggoner. Amcast Industrial Corp. v. Dextrex Corp., 2 F.3d 746 (7th Cir. 1993). As noted by the Seventh Circuit in Amcast, the "arranged for" language in the CERCLA statute implies intentional action. Id., at p. 751. There was no intentional action by Monsanto to dispose of its products in any of the Sauget Sites. Rather its intent was to contract with a hauler to get its products to its customers. See also, South Florida Water Mgmt. Dist. v. Montalvo, 84 F.3d 402, 407 (11th Cir. 1996); United States v. Cello-Foil Products, Inc., 100 F.3d 1227, 1232 (6th Cir. 1996). The government has no evidence that would prove the intent requirement mandated by Amcast.

In sum, the government's evidence is simply too weak to establish by a preponderance of the evidence, as is required, that Monsanto's hazardous substances were deposited at Site G.